Supreme Court, U.S.
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No. 01-946

In The

Supreme Court of the United States

SMEDVIG TANKSHIPS, LTD., SMEDVIG TANKSHIPS (AGENCIES), LTD., SMEDVIG TANKSHIPS MANAGEMENT, LTD., SMEDVIG TANKSHIPS, A.S., A/K/A SMEDVIG TANKREDERI A.S., PEDER SMEDVIG, A.S., PEDER SMEDVIG SINGAPORE, PTE., LTD., K.S. SMEDVIG TANKERS V, AND K.S. SMEDVIG TANKERS VI,

Petitioners,

vs.

SHERIFF I.F. HINGLE,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals, Fourth Circuit, State Of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

The petition in general correctly states the relevant facts of the case. However, the petition mischaracterizes the sheriff's statutory commission as a tax and further incorrectly asserts that a constitutional challenge was made by Petitioner in the district court.

REASONS FOR DENYING THE WRIT

In the instant case, the Louisiana courts decided the legal issues in accordance with federal law and federal standards. The standards used by the Louisiana courts do not conflict with the decision of any other state court of last resort or of a United States Court of Appeals nor with any holding of this Court. Review of the decisions by the Louisiana courts reveal that Petitioners never filed any pleading raising the constitutional issue with the district court.

Petitioners seek review of a Louisiana State Court decision refusing to address the constitutionality of a Louisiana State Statute because Petitioners failed to comply with Louisiana's longstanding jurisprudential rule that the constitutionality of a statute must first be questioned in the trial court and the alleged unconstitutionality of the statute must be specifically pleaded. *Vallo v. Gayle Oil Co., Inc.*, 94-1238 (La. 11/30/94), 646 So.2d 859, 864-65 (citations omitted).

Louisiana law is clear in that the unconstitutionality of a statute must be specifically pleaded in a petition, an exception, a motion, or answer and "cannot be raised in a

memorandum, opposition or brief as those documents do not constitute pleadings." *Id.* at 865.

This was the exact holding of the Louisiana Appellate Court when Petitioners unsuccessfully attempted to convince the panel to consider the merits of their constitutional attack. In the case below entitled *Nestor Abuan, as guardian on behalf of Carlos Valdez v. Smedvig Tankships, Ltd. et al.*, 786 So.2d 827 (La. App. 4th Cir. 4/11/01) the court stated unequivocally:

> In opposition to the sheriff's motion to tax cost, defendants argued in their memorandum that the fee and commission were an unconstitutional tax on interstate commerce in violation of the United States Constitution. Although there is no single procedure or type of proceeding for challenging the constitutionality of a statute, the longstanding jurisprudential rule is that the statute must first be questioned in the trial court and the unconstitutionality of the statute must be specifically pleaded. *Rodgers v. James River II, Inc.*, 94-1807 (La. App. 4 Cir. 9/28/95), 661 So.2d 173, 176, *citing Vallo v. Gayle Oil Co., Inc.*, 94-1238 (La.11/30/94), 646 So.2d 859, 864-65. Accordingly, the unconstitutionality of a statute must be specifically pleaded in a petition, an exception, a motion, or answer and "cannot be raised in a memorandum, opposition or brief as those documents do not constitute pleadings." *Id.* Moreover, although the attorney general is not an indispensable party, he should be served a copy of the pleading, contesting the constitutionality of a statute. *Id.* The constitutionality of the statute is not in a proper posture for this court's review. The defendants raised the question of constitutionality in a memorandum in

> opposition to the sheriff's motion to tax cost. In addition, the defendants did not serve or notify the Attorney General of the constitutional challenge, so that the Attorney General could elect whether or not to exercise his statutory right to represent the state's interest in the proceeding. LSA-R.S. 49:257(B).

This Honorable Court has likewise refused to consider constitutional attacks on state statutes where a litigant has failed to properly urge requisite arguments in the lower courts. In *Lear, Inc. v. Adkins*, 395 U.S. 653 at 680, 89 S.Ct. 1902 at 1916, 23 L.Ed.2d 610 (1969) (Mr. Justice White Concurring), this Court stated:

> Given Lear's failure below to 'specially set up or claim' the federal bar to collection of royalties in the event Adkins' patent was invalidated, and without the California Supreme Court's 'final judgment' on this issue, I doubt our jurisdiction to decide the issue. But even if jurisdiction exists, the Court should follow its characteristic practice and refuse to issue pronouncements on questions not urged or decided in the state courts.
>
> In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940), the Court, while recognizing it had jurisdiction to determine whether a New York tax was an unconstitutional burden on interstate commerce, refused to consider whether the tax was a prohibited impost or duty on imports and exports, saying: '(I)t is only in exceptional cases, and then only in cases coming from the federal courts, that (the Court) considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. * * * (D)ue

regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there.' Id., at 434, 60 S.Ct., at 672.

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946), reached a similar conclusion. There the Court denied a government contractor the benefit of the implied constitutional immunity of the Federal Government from taxation by the State, but at the same time declined to consider whether the state tax at issue placed a forbidden tax directly on the United States. This was because the Court was 'not free to consider' a ground of attack 'not presented to the Supreme Court of Arkansas or considered or decided by it,' even though the issue was in some measure related to one actually decided by the state courts and arose under the same implied constitutional immunity argument. Id., at 483, 66 S.Ct. at 668. Cf. *Dewey v. Des Moines*, 173 U.S. 193, 197-198, 19 S.Ct. 379, 380, 43 L.Ed. 665 (1899). The Court relied on McGoldrick and a long line of prior cases, including *People of State of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 317, 57 S.Ct. 466, 469, 81 L.Ed. 666 (1937), where the Court had said: 'In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the constitution with respect to which other questions are properly presented.'

The result is the same when a party has attempted to raise an issue in the state court but

> has not done so in proper or timely fashion. 'Questions first presented to the highest State court on a petition for rehearing come too late for consideration here * * * .' *Radio Station WOW v. Johnson*, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092 (1945). 'Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here.' *CIO v. McAdory*, 325 U.S. 472, 477, 65 S.Ct. 1395, 1398, 89 L.Ed. 1741 (1945). And no different conclusion obtains when the federal question, although not yet presented to or decided by the state court, will probably or even certainly arise during further proceedings held in that court. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 466-467, 78 S.Ct. 1163, 1173-1174, 2 L.Ed.2d 1488 (1958); *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 394-395, 84 S.Ct. 1273, 1279, 12 L.Ed.2d 394 (1964).
>
> Wholly aside from jurisdictional considerations or those relating to our relationships with state courts, there is the matter of our own Rule 23(1)(c), which states that '(o)nly the questions set forth in the petition or fairly comprised therein will be considered by the court.' See *Flournoy v. Wiener*, 321 U.S. 253, 259, 64 S.Ct. 548, 551, 88 L.Ed. 708 (1944).

Petitioners failed to properly put the constitutional issue before the trial court below and the Louisiana Fourth Circuit Court of Appeals correctly refused to pass on the argument which was not properly before it. Thereafter, the Louisiana Supreme Court unanimously agreed to refuse Petitioners' Writ of Certiorari. This Honorable

Court should follow suit and deny Petitioners' Writ application.

CONCLUSION

Petitioners' Application for a Writ of Certiorari does not remotely meet the standards imposed by Rule 10 of the Rules of the Supreme Court of the United States. The rulings of the trial court, court of appeal and Louisiana Supreme Court in no way conflict with the decisions of another state court of last resort or of a United States Court of Appeal or this Court. Instead, the decision of the Louisiana courts meticulously follows the teachings of this Court.

Respectfully submitted:

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